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CHARLES ELMORE

No. 338

In The
Supreme Court of the United States

October Term, 1951

THE CARTER OIL COMPANY,
Petitioner,
VERSUS

T. H. MCCASLAND, N. W. BRILLHART, GLENN NORVILLE, CHARLES R. RIDER, THOMAS H. MCCASLAND, JR., Trust; MARY FRANCES MCCASLAND, Trust; JOHN FLACK BURTON, Trust; and JAMES LESLIE BURTON, Trust,
Respondents.

RESPONSE TO PETITION FOR REHEARING

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NOVEMBER, 1951.

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RESPONSE TO PETITION FOR REHEARING

Petitioner will be designated herein as Carter. The respondents will be designated as McCasland *et al.*

This Court should deny Carter's Petition for Rehearing for the following reasons, to-wit:

(1) Said Petition was not filed pursuant to or in conformity with Sub-division 2 of Rule 33 of this Court.

(2) The statements contained in the Van-Grisso opinion (attached to Carter's Petition for Rehearing as appendix or exhibit) upon which Carter strongly relies are dicta.

(3) The decision in the Van-Grisso case has not become final as the extended time for filing the Petition for Rehearing in said case will not expire until December 7, 1951.

ARGUMENT

PROPOSITION I

Said Petition was not filed pursuant to or in conformity with Sub-division 2 of Rule 33 of this Court.

Sub-division 2 of Rule 33 requires that a Petition for Rehearing must be "confined to intervening circumstances of substantial or controlling effect, or to other substantial grounds available to petitioner although not previously presented." The *Van-Grisso case* was decided by the Supreme Court of the State of Oklahoma on October 23, 1951. The Carter Oil Company and its attorneys had a copy of the opinion mailed to them by the clerk of the Supreme Court on the date the case was decided in accordance with the custom of the Court and, in the ordinary course of mail, should have received this opinion on October 24, 1951. The Petition for Writ of

Certiorari in this case was denied by this Court on November 5, 1951, some twelve days after the Carter Oil Company and its attorneys had full notice and knowledge of the decision of the Supreme Court of the State of Oklahoma in the *Van-Grisso case.*

With a full knowledge of the opinion of the Oklahoma Supreme Court in the *Van-Grisso case,* the Carter Oil Company did not call that decision to this Court's attention but preferred to gamble upon the ruling of this Court on its Petition for Writ of Certiorari and if it lost its gamble by having such Petition for Writ of Certiorari denied, then to file a Petition for Rehearing and for the first time call to this Court's attention a decision of the Supreme Court of the State of Oklahoma, not yet final, rendered some twelve days prior to this Court's denial of the Writ of Certiorari.

Carter does not call this Court's attention to substantial grounds available to the petitioner other than those heretofore called to this Court's attention by its Petition for Certiorari. In its Petition to this Court for Writ of Certiorari it called to this Court's attention every ground that it had, substantial or otherwise.

PROPOSITION II

The statements contained in the Van-Grisso opinion (attached to Carter's Petition for Rehearing as appendix or exhibit) upon which Carter strongly relies are dicta.

The only statements contained in the *Van-Grisso opinion* from which Carter can obtain any comfort or solace are two in number and simply say:

> "Carter's lease authorized it to produce oil from any point below 4,000 feet from the surface of the land. Van-Grisso's lease authorized it to produce from a well at any point above the 4,000-level. No legal restrictions were imposed upon these contract rights of the parties." (Lines 32 to 36, inclusive, Page 19, Carter's Petition for Rehearing.)

There was involved in the *Van-Grisso case* the validity of an order of the Corporation Commission fixing the allowable production of oil from a 10-acre tract of land, and fixing the amount or percentage thereof to be taken by the Carter Oil Company and Van-Grisso Oil Company.

The Supreme Court of the State of Oklahoma held the order to be invalid for two reasons:

The first reason advanced by the Oklahoma Supreme Court for holding the order of the Commission invalid and void was that Section 52, O.S. Supp. 1949, Sec. 87.1 (a), (b), (c) and (d), did not empower or authorize the Commission to enter such an order because no well-spacing or drilling units had been established by the Commission in the field involved in that action, and since no well-spacing or drilling units had been established that the statute was not sufficient to authorize the Commission to enter an order.

The second reason given by the Supreme Court of the State of Oklahoma for holding said order to be invalid and void was that the order of the Corporation Commission was not supported by any competent evidence.

These are the only two reasons given by the Supreme Court of the State of Oklahoma for holding the order void. The second reason was unnecessary because the court had already held the Commission to be without jurisdiction to enter the order. It was not necessary for the Supreme Court of the State of Oklahoma, in order to find the Commission without jurisdiction to enter an order, to determine the respective rights of the parties to that action to the oil underlying the premises, or to use the expression that it did use as to the respective rights of the parties and that expression as heretofore stated is *dicta* and was not necessary to the decision reached by the Court. The Corporation Commission of the State of Oklahoma has neither statutory nor constitutional authority to decide property rights and made no effort to decide property rights in its order. The expression from the *Van-Grisso opinion* first above set out in this proposition and so strongly relied upon by Carter is not mentioned in the syllabus and is, therefore, not the law of the case.

Corbin v. *Wilkinson*, 175 Okl. 247,
52 P. 2d 45.

PROPOSITION III

The decision in the Van-Grisso case has not become final as the extended time for filing the Petition for Rehearing in said case will not expire until December 7, 1951.

Carter has a yen for citing to this Court in support of its contention decisions that are not in any respect final. The Carter Oil Company and its attorneys are fully aware of the fact that the *Van-Grisso decision* is not final and that the extended time for filing a Petition for Rehearing in that case will not expire until December 7, 1951. We do not believe that this Court should base its decision upon any opinion, that has not yet become final. We do not concede that the *Van-Grisso decision* throws any light upon the issues involved in this action. Such decision even if it does become final in its present form, does not involve the same contract as that involved in the case at Bar.

PROPOSITION IV

Carter's request that: "The decision of this case be withheld to give it opportunity to institute an action in the Oklahoma courts and to secure an answer to the issues herein raised from the court of final jurisdiction of the State of Oklahoma", should be rejected by this Court.

This proposition is argued by Carter, commencing at Page 4 and extending through Page 5 of its Petition

for Rehearing. The Carter makes the statement that: "These farm-out contracts are prevalent in practically every producing area in Oklahoma, which is a large producing State. The true interpretation of the contract is important and is a matter of State concern."

This is not a correct statement of fact. Farm-out contracts, such as that involved in the instant case, are not in prevalent use in the State of Oklahoma. A search of the recording offices in every county in the State of Oklahoma would very probably not disclose such a farm-out agreement except those found of record in Grady County, Oklahoma, where the land involved in this controversy is located. There are probably some six or seven farm-out agreements similar at least, although not exactly like the farm-out agreement involved in this action. Most of these were executed by Carter Oil Company and all involved properties in the Carter-Knox field in Grady County, Oklahoma. From the hundreds of farm-out agreements which we have seen involving different oil fields in Oklahoma, these are the first we have ever encountered where leases were assigned as to producing horizons and it is our best judgment that from the thousands of farm-out agreements which the attorneys for Carter Oil Company have seen covering oil fields in the State of Oklahoma and throughout the United States, these are the first assignments they had seen, prior to the commencement of this action, where leases were assigned as to producing horizons instead of as to specific depths.

The only people actually concerned with the construction of the contract involved in this action are the parties to this contract. This is private litigation in which the State of Oklahoma as a State is not interested and which neither involves nor determines a recognized defined public policy of the State of Oklahoma, nor does it have to do with the enforcement of any State statute by any regulatory or administrative body of the State.

If this Court invokes the rule sought by Carter, that is to grant the Writ of Certiorari and to then withhold a decision in this case until such time in the future as the Carter may be able to have an expression of our State Court on the questions involved in this action, it will, in effect, destroy the grant of jurisdiction to the Federal courts found in Section 1332 of the Judicial Code; that is, it will forever put at rest the jurisdiction of the Federal courts in diversity of citizenship cases, leaving only such cases for the Federal courts to determine as may involve a Federal constitutional question, or some question arising under the statutes of the United States.

The mere fact that the problem of ascertaining the State law may often be difficult is not a sufficient ground for a Federal court to decline to exercise its jurisdiction to decide a case properly before it.

Where a Court of Appeals has expressed an opinion as to the law of a State included within the Circuit, the

Supreme Court accepts that construction as being the law of the State and will not reverse the judgment.

See:

Helvering v. *Stuart*, 317 U.S. 154, 87 L. ed. 154.

Furthermore, to hold the decision in the case at Bar in abeyance would deprive McCasland *et al.* of the rights given them under the declaratory judgment statute, under which statute this action was filed and tried (28 U.S.C.A. 2201).

Counsel for Carter would have this Court believe that the decision rendered by the Court of Appeals in the case at Bar affects the oil and gas business of the State of Oklahoma as a whole. This is not true. This case has been in court for approximately two years and Carter and its counsel knew for approximately two years before the filing of this action that McCasland *et al.*, were contending, as they are in the case at Bar, and notwithstanding this fact, Carter made no effort to obtain a decision of the court of last resort of the State of Oklahoma on the questions involved in this case. McCasland *et al.* availed themselves of the declaratory judgment statute, as they had a right to do. If this Court should remit the parties to the State Court, as requested by Carter, it would only delay further the disposition of this litigation which has been pending for approximately two years and which is now ripe for decision. Such action would penalize McCasland *et al.*, for resorting to a jurisdiction which they were entitled to invoke.

Briefly, in support of our position that the request for Carter to withhold a decision of this case should be rejected, we cite:

Propper v. *Clark*, 337 U.S. 472, 93 L. ed. 1480;
Helvering v. *Stuart*, 317 U.S. 154, 87 L. ed. 154;
Meredith v. *Winterhaven*, 320 U.S. 227, 88 L. ed. 9;
Williams v. *Green Bay & W. Ry. Co.*, 326 U.S. 549, 90 L. ed. 311;
Estate of Sidney M. Spiegel v. *Commr. of Internal Revenue*, 335 U.S. 701, 93 L. ed. 330.

These cases distinguish the cases cited by Carter in support of its request.

In conclusion, we therefore respectfully submit that Carter's Petition for Rehearing be denied.

Respectfully submitted,

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